No. 95-227

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
PEOPLE FOR THE AMERICAN WAY,
NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA,
MEDIA ACCESS NEW YORK,
BROOKLYN PRODUCERS' GROUP, AND
DAVID CHANNON,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO CERTIORARI

I. MICHAEL GREENBERGER
Counsel of Record
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

[Names of Additional Counsel Appear On Inside Front Cover]

October 20, 1995

ANDREW JAY SCHWARTZMAN
GIGI SOHN
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

ELLIOT MINCBERG
LAWRENCE OTTINGER
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for Petitioner People for the American Way

ROBERT T. PERRY
509-12th Street, Apt. 2C
Brooklyn, NY 11215
(718) 768-2209

Counsel for Petitioners New York Citizens Committee for Responsible Media, Media Access New York, the Brooklyn Producers' Group, and David Channon

I. MICHAEL GREENBERGER
Counsel of Record
THOMAS J. MIKULA
MICHAEL K. ISENMAN
DAVID B. GOODHAND
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioners the Alliance for Community Media, the Alliance for Communications Democracy, and People for the American Way

JAMES N. HORWOOD
SPIEGEL & MCDIARMID
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4002

Counsel for Petitioners the Alliance for Community Media and the Alliance for Communications Democracy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

ADMINISTRATIVE ORDERS:

CONSTITUTION AND STATUTES: Page

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-227

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
PEOPLE FOR THE AMERICAN WAY,
NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA,
MEDIA ACCESS NEW YORK,
BROOKLYN PRODUCERS' GROUP, AND
DAVID CHANNON,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO OPPOSITION TO CERTIORARI

In our Petition for a Writ of Certiorari ("petition" or "pet."), we showed that certiorari should be granted because this petition raises the important question of whether Congress can evade constitutional scrutiny of federal legislation that on its face favors some speech and disfavors other speech, based solely upon the speech's content. We also showed that certiorari was appropriate because the decision below conflicts with numerous decisions of this Court and other courts.

In opposition, the government attempts to downplay the significance of this case, by asserting (at 10) that further review is "not warranted" because the *in banc* decision "does not conflict with that of any other court of appeals" and was "correctly" decided. The government also mischaracterizes the question presented in this case as whether a cable operator's decision to prohibit indecent programming is state action. As we now show, however, the government responds weakly, if at all, to the points raised in our petition, and presents no reasons for denying the writ.

1. The government's contention that review is not warranted because of the absence of an inter-circuit conflict overlooks the fact that certiorari is particularly appropriate in this case because the *in banc* court "has decided an important federal question in a way that conflicts with relevant decisions of *this* Court." S. Ct. R. 10(c) (emphasis added).[1] Indeed, the two most important of these conflicting precedents -- *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445 (1994) and *Skinner* v. *RLEA*, 489 U.S. 602 (1989) -- are not even mentioned in the government's Opposition. Further, as we showed in our petition (at 18, 23-24), the *in banc* decision *does* conflict with decisions from several other appellate courts. See *Price* v. *International Union, UAW*, 927 F.2d 88 (2d Cir. 1991); *Reid* v. *McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971); *City of Jamestown* v. *Beneda*, 477 N.W.2d 830 (N.D. 1991).

2. In our petition, we showed (at 14-17) that the decision below conflicts with *Turner* because Sections 10(a) and 10(c) and their implementing regulations create a content-based scheme for regulating cable programming that requires strict scrutiny under the First Amendment. Because petitioners are challenging the government's power to enact such a content-based scheme in the first place, the only "state action"

---

[1] See, *e.g.*, *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956) (pet. at 17-19); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) (pet. at 23-24); *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989) (pet. at 25-27).

necessary to invoke the strict scrutiny is the creation of this scheme itself.

The government's response never even cites *Turner*, or disputes that Sections 10(a) and 10(c) create a content-based regulation of speech. Instead of analyzing the impact of that controlling decision on this case, the government contends (at 12) that the "mere enactment of [10(a) and 10(c)] does not limit the speech of any individual or entity," and that no "First Amendment effect" would occur until "cable operators decide not to carry indecent access programming." In the government's view, the only relevant question is whether a cable operator's decision not to carry indecent programming can be attributed to the state. The government, like the *in banc* majority, concludes that such a decision is not attributable to the state, because Sections 10(a) and 10(c) merely "restore" editorial discretion to cable operators that was taken away by the 1984 Cable Act.

As we pointed out in our petition (at 14-17), however, the mere enactment of Sections 10(a) and 10(c) does have a "First Amendment effect." Congress and the FCC have made a judgment that all access programming should be free from censorship by cable operators, except for programming that is "indecent." It is that very judgment to distinguish between the legal protections afforded to speech based on its content -- not the decision of an individual cable operator to censor a program -- that petitioners challenge here. By explicitly denying "indecent" programming the same statutory protection against censorship afforded all other access programming, Congress and the FCC have created a content-based hierarchy of speech, in violation of the First Amendment. Under *Turner*, "exacting scrutiny" must be applied to such "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." 114 S. Ct. at 2458-59.

Moreover, the government's contention that Sections 10(a) and 10(c) merely restore to cable operators editorial discretion that was withdrawn by the 1984 Act is both factually erroneous and legally irrelevant to the state action question in this case. It is undisputed that local cable franchise agreements, from

their genesis long before the 1984 Act, required cable operators to provide capacity for public access channels, but precluded cable operators from exercising editorial discretion over the content of programming on these channels. See pet. at 4-6. It is for this very reason that the FCC, in implementing the 1992 Act, announced, *inter alia*, that all "prior agreements" were "supersede[d]." Second Order ¶ 10 n.7, App. 184a. Thus, the 1992 Act did not restore discretion taken away by the 1984 Act; as a matter of local law (or the franchise agreement) -- which creates property rights in the first instance, see *Bishop* v. *Wood*, 426 U.S. 341, 344 & n.7 (1976) -- most cable operators never had that discretion with respect to public access channels in the first place.

In any event, a statute that partially restores to a private actor discretion that was itself previously withdrawn by statute must be considered state action, where the restoration of discretion contradicts the Constitution. For example, Congress might carve out an exception to Title VII's prohibition on employment discrimination based on creed, by amending the law to allow private employers to discriminate against persons of a particular religion -- say, Methodists. The government could attempt to defend such a statute against constitutional attack on state action grounds, since it merely "restores" to employers the right to discriminate against Methodists that they had before Title VII. A statute that singles out this group for exclusion, while discrimination against persons of all other religions remains outlawed, would undoubtedly be considered state action, however, and its constitutionality would be scrutinized carefully under the First Amendment.

Here, Congress's partial "restoration" of editorial discretion similarly demands constitutional scrutiny. The 1992 Act "restored" editorial discretion over only one category of constitutionally protected speech based solely on its content, while leaving intact the broader proscription against censorship of all other programming. In essence, the 1992 Act converts a content-neutral prohibition against censorship of speech into one that is content-based. The government cannot enact such a scheme, and then avoid all constitutional scrutiny by

retreating behind the state action doctrine, simply because the actual task of censorship will be performed by a private actor. A law that bars censorship of most speech, but allows censorship of other speech based solely on its content, must be subject to scrutiny under *Turner*, regardless of who does the censoring.

3. Because we are challenging the actions of the government in enacting such a content-based law, and not that of private cable operators, there is no merit to the government's suggestion (at 10-11 n.5) that the pendency of two cases, *Altmann* v. *Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994) and *Goldstein* v. *Manhattan Cable Television, Inc.*, No. 90 CIV 4750 (S.D.N.Y. Sept. 20, 1995), justifies denying certiorari here. Those cases are not facial challenges to Section 10, but rather involve individual disputes over the conduct of private cable operators, and not the conduct of the government. Moreover, they lack the detailed and extensive administrative record present in this case, which arises from a national rulemaking. In fact, this petition presents this Court with its *only* opportunity to review Section 10 (and the nationwide rulemaking to implement it) in the context of a facial challenge to the *government's* conduct. There will be no other opportunities because the time to challenge the implementing rulemaking has long since expired. See 28 U.S.C. § 2344. Furthermore, the state action question requires no further factual development, and should be reviewed now to avoid further costly litigation over the constitutionality of Section 10. In short, contrary to the government's suggestion, this case is the ideal vehicle for review of the, as Judge Sand stated it, "close and complex" constitutional questions raised by Section 10. *Goldstein*, slip op. at 5.

4. In our petition, we also showed how the *in banc* opinion conflicted with this Court's opinion in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956). Specifically, we demonstrated (at 17-19) how the *in banc* opinion failed to square the 1992 Act's preemptive effect with *Hanson*'s conclusion that state action attaches when federal law preempts contrary state and

local laws. The government's efforts to avoid the obvious import of *Hanson* are unavailing.

The government first argues (at 13) that the 1992 Act presents a different case: "[u]nlike *Hanson* * * * federal law does not provide the 'source' of the cable operator's 'power and *authority*' to control indecent programming over access channels." (Emphasis added.) This position, however, is directly at odds with its concession in the immediately preceding paragraph. There, the government admits (at 13) that "[t]o be sure, without Sections 10(a) and 10(c), cable operators would not have had the *authority* to prohibit indecent access programming." (Emphasis added.) It is the latter position, of course, that is correct. The 1992 Act -- "federal law" -- provides the cable operators with a power to ban that cannot be altered by either state law or contrary franchising agreements. Indeed, until the 1992 Cable Act, most cable operators had *never* had this power. See *supra* pp. 3-4.

Apparently recognizing the fundamental weakness inherent in any effort to distinguish the present case from *Hanson*, the government alternatively argues that *Hanson* has been essentially overruled. Citing the 1974 case of *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the government charges (at 14) that "since *Hanson*, this Court has made clear that the actions of private parties cannot be attributed to the government unless there is a 'sufficiently close nexus' between the private party's actions and those of the government * * * ." *Jackson*, however, is not a preemption case, and, at any rate, this argument ignores that this Court has repeatedly reaffirmed *Hanson*'s rationale. Thus, in both 1977 and 1988, this Court approvingly cited *Hanson* for the proposition that "because" the federal railroad law "pre-empt[ed] all state laws" banning union-security agreements, the negotiation and enforcement of such provisions in private railroad contracts involved "governmental action." *Communications Workers of America* v. *Beck*, 487 U.S. 735, 761 (1988); see also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977). In short, *Hanson*'s central premise -- state action follows from preemption because

the federal statute creates a right or privilege that permits private actors to override contrary state law -- is still good law.

5. In our petition, we demonstrated how the entire structure of the 1992 Act -- like the structure of the drug-testing law at issue in *Skinner* v. *RLEA*, 489 U.S. 602 (1989) -- acts to significantly encourage the prohibition of all indecent cable access programming. In this regard, we noted (at 19-23) that the 1992 Act revokes an operator's immunity for cable speech by third parties that "involves obscene material"; that the 1992 Act provides the "rule of decision" pursuant to which a cable operator acts; and that the government (specifically, the FCC) arbitrates any disputes about the applicability of this rule of decision.

The government addresses only the first of these factors, arguing (at 14) that there is no reason to believe that Section 10(d) will provide a "special incentive to operators to ban indecent programming that is not obscene." This ignores entirely, however, the unrefuted record evidence. As the cable operators themselves testified, subsection 10(d) will force the operators to "ban all questionable programming," including "speech that may in fact be constitutionally protected." Pet. at 21 (citations omitted). This also ignores the fact that Section 10(d) applies to any programming that "involves" obscene material, a definition which even the FCC agreed was "too broad to satisfy constitutional standards." First Order, ¶ 44 n.40, App. 152a.[2]

The government also contends (at 14-15) that "[s]ome self-censorship is an inevitable result of all obscenity laws." Once again, however, the government's argument misses the mark. Even assuming *arguendo* the propriety of this assertion, it is not simply the possibility of "*self*-censorship" that raises First Amendment concerns, but also the strong likelihood that

---

[2] The FCC tried to rectify this overbroad definition in its First Report and Order, ¶ 44 n.40, App. 152a, but because it failed to incorporate its narrowing construction into the text of the regulations it promulgated, this broad operator liability provision remains in effect.

the cable operators would ban all "faintly objectionable" programming of access users -- that is, the speech of *others* -- "out of an excess of caution." *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U.S. 525, 530 (1959).

Finally, the government does not even try to answer our other points. Thus, the government does not challenge the obvious significance of the fact that it is the government (through passage of the Act) that is "responsible" for the "rule of decision" (*e.g.*, the definition of indecency) pursuant to which the private cable operator may act. Pet. at 21-22. Nor does the government challenge the import of the FCC's arbitral function in resolving disputes about this definition. Pet. at 22. As we demonstrated in our petition, each of these facts supports the conclusion that the 1992 Act demands First Amendment scrutiny.

6. The government, as we predicted in our petition, also attempts to escape the fact that public access provides an electronic public forum for the cable medium by erroneously contending (at 15-16) that (i) access channels "belong to private cable operators", and (ii) only "government property" can be a public forum (in support of which the government cites only to a *dissenting* opinion in *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)). We explained in our petition (at 23-25) why both of these contentions are wrong. In brief, it is a vast oversimplification to characterize access channels as purely private property and, in any event, as this Court stated in *Cornelius*, private property may be considered a public forum if it has been "dedicated to public use." 473 U.S. at 801.[3]

---

[3] In an attempt to avoid our public forum argument entirely, the government raises a red herring: common carriers. Citing, *inter alia*, this Court's opinion in *Jackson* and two lower court "dial-a-porn" opinions, the government asserts (at 16) that "a common carrier of information does not act as the government when it distinguishes between speech on the basis of its content." These cases, however, are entirely inapt. We are not contending that a private cable operator is a state actor simply because it is a regulated public utility. Instead, we are contending that when Congress passes a content-based law restricting access to a public forum, state action is inherent.

7. The Government responds to our argument that the decision below conflicts with *Sable Communications* v. *FCC*, 492 U.S. 115 (1989), in two ways, both of which are unavailing. First, the Government contends (at 17) that voluntary blocking based on lockboxes would impose special inconveniences on subscribers that would not be imposed by Section 10(b)'s mandatory blocking and segregation scheme. As a preliminary matter, the Government's argument is factually incorrect. The uncontradicted record evidence demonstrates that lockboxes are easy to use and certainly more convenient than Section 10(b)'s requirement that a subscriber request, in writing, that a leased access channel be unblocked. More importantly, even if there were some factual basis to the Government's argument, mere convenience provides *no* justification for not complying with *Sable*'s mandate that the least restrictive means be used to achieve a compelling governmental interest. Indeed, a complete ban on indecency, which unquestionably would be unconstitutional, would impose the smallest inconvenience on a subscriber since it would eliminate choice entirely.

Second, the Government attempts to explain away the complete absence of any discussion in the legislative record of less restrictive alternatives, such as the existing lockbox requirement, by arguing (at 18) that "Congress *could* reasonably draw upon the knowledge" of the ineffectiveness of blocking devices in the telephone medium. (Emphasis added.) In fact, the reasons for the ineffectiveness of telephone blocking devices are entirely inapplicable to cable lockboxes.[4] In any event,

---

And, as we showed in our petition (at 23-25), access channels are a public forum.

[4] To take the most obvious example, the Federal Communications Commission found telephone blocking devices ineffective against "dial-a-porn" because parents could not program such devices to block each telephone number of every "dial-a-porn" service in the United States and overseas. Not only was there no listing of the approximately one-hundred such services nationally, but their numbers were constantly changing, making any such list quickly obsolete. See GEN Dkt. No. 83-989, FCC 86-322, ¶ 17 (released July 18, 1986). By contrast, to meet the purposes of Section 10, cable lockboxes need be capable of blocking only the handful of access channels available on

regardless whether Congress *could* do so, the fact remains that Congress did no such thing. To the contrary, the legislative record reveals no mention of lockboxes or any other less restrictive means of achieving Congress' supposed objective. Post hoc, factually erroneous justifications cannot save Section 10(b) under these circumstances.

8. Finally, it is important to answer once again the government's charge (at 3) that Section 10 -- which governs both leased and public access channels -- is necessary to "protect against the harm to children." To this end, the government devotes a considerable amount of space in the Background Section of its Opposition (at 2-4) to a recitation of the anecdotal evidence related on the Senate floor which, the government asserts, reflects the variety of "highly indecent material" available on access channels. As we described in our petition (at 4 n.3), however, *all of the anecdotal examples occurred, if at all, on leased access, not public access.*[5] The government concedes this point, noting (at 9) that public access channels do "not pose dangers on the order of magnitude of those identified on leased access channels." More significantly, the government does not even attempt to address the argument that the law, as written, will no doubt result in the censorship of a broad category of public access programming of substantial literary, artistic, scientific and political merit, including programs that focus on such topics as health and sex education, art censorship, and feminism.

CONCLUSION

The Petition for Certiorari should be granted.

---

the local cable system, the channel location of which the cable operator informs subscribers.

[5] As we also noted in our petition (at 25-27), such anecdotal hearsay -- recounted through a small number of constituent letters -- is certainly not the kind of record evidence this Court demands in the First Amendment context. See *Turner*, 114 S. Ct. at 2471 (plurality opinion) (when "First Amendment rights are implicated," Congress must draw "reasonable inferences based on substantial evidence").

Respectfully submitted,

ANDREW JAY SCHWARTZMAN
GIGI SOHN
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

ELLIOT MINCBERG
LAWRENCE OTTINGER
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for Petitioner People for the American Way

ROBERT T. PERRY
509-12th Street, Apt. 2C
Brooklyn, NY 11215
(718) 768-2209

Counsel for Petitioners New York Citizens Committee for Responsible Media, Media Access New York, the Brooklyn Producers' Group, and David Channon

I. MICHAEL GREENBERGER
Counsel of Record
THOMAS J. MIKULA
MICHAEL K. ISENMAN
DAVID B. GOODHAND
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Petitioners the Alliance for Community Media, the Alliance for Communications Democracy, and People for the American Way

JAMES N. HORWOOD
SPIEGEL & MCDIARMID
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4002

Counsel for Petitioners the Alliance for Community Media and the Alliance for Communications Democracy

October 20, 1995